INDEX

CITATIONS

Cases:

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DENVER BUILDING AND CONSTRUCTION TRADES COUNCIL; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A. F. OF L., LOCAL 68; AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A. F. L., LOCAL No. 3

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on September 1, 1950 (R. 282), denying enforcement of an order issued by the Board against the above-named labor organizations (R. 260-261).

OPINIONS BELOW

The opinion of the Court of Appeals (R. 265-281) is not yet officially reported. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 256-263, 211-247) are reported at 82 NLRB 1195.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1950 (R. 282). The jurisdiction of this Court is invoked under Section 1254 of 28 U. S. C., as codified June 25, 1948, and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Because a non-union subcontractor and his employees were working there, unions picketed at the situs of a construction project. The picketing was designed to induce employees of the general contractor and other subcontractors to cease work on the project, an object thereof being to force or require the general contractor to cease doing business with the non-union subcontractor on the project. The question presented is whether by such picketing the unions violated Section 8 (b) (4) (A) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III. 141, *et seq.*), are set forth in the Appendix, *infra*, p. 19.

STATEMENT

Upon the usual proceedings under Section 10 of the amended Act, the Board, on April 13, 1949, issued its findings of fact, conclusions of law and order (R. 256-263, 211-247). Briefly, in pertinent part, the Board found that the respondent labor organizations violated Section 8 (b) (4) (A) of the Act by picketing a building being erected by Doose & Lintner, a general contractor, thereby causing members of local unions affiliated with the respondent Council to cease work on that project, with an object of forcing Doose & Lintner to cease doing business with Gould & Preisner, a non-union subcontractor who was employed on the building project. The Board's subsidiary findings and the supporting evidence may be summarized as follows:[1]

The Denver Building and Construction Trades Council, hereinafter called the Council, is a labor organization composed of delegates from the various local labor unions whose members are engaged in building and construction work in Denver, Colorado, and vicinity. The Council is engaged in representing and protecting the interests of its constituent unions and their members (R. 220; 22, 29). Among the craft unions affiliated with the Council are the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Inc., Local No. 3, hereinafter called the

[1] In the following statement, whenever a semicolon appears, record references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

Plumbers, and the International Brotherhood of Electrical Workers, A. F. L., Local 68, hereinafter called the Electricians (*ibid.*).

Gould & Preisner is a partnership composed of Earl C. Gould and John C. Preisner (R. 216; 22, 29, 54-55). For approximately 20 years the firm has been engaged in electrical contracting work in connection with residential, commrecial and industrial construction projects in Denver, Colorado (*ibid.*). In the course of its operations Gould & Preisner purchases various materials including copper wire, electric metallic tubing, conduits, steel boxes, panels, switches, and plugs. In 1947, the firm purchased raw materials valued at $86,500 of which approximately 65 percent, or $55,745, was purchased directly from more than forty firms located outside of the State of Colorado. Of the materials purchased locally in Colorado, practically all were produced outside of Colorado and then resold to Gould & Preisner (R. 216-217; 55-56).

Among the customers of Gould & Preisner are several firms which are engaged in interstate commerce. During 1946 and 1947, for example, Gould & Preisner performed work for such firms ranging in value from $1,024 to $7,467 (R. 217; 58-60, 171).

At the time of the hearing before the Board's Trial Examiner in the instant case, Gould & Preisner had 28 employees (R. 216; 55). The firm has operated as a non-union shop (R. 261; 91). As a consequence, it has been involved in a long-stand-

ing labor dispute with the Council and some of its affiliates, particularly the Electricians, and for many years the firm has been listed as "unfair" by the Council (R. 220-221; 132).

In September 1947, Gould & Preisner entered into arrangements with Doose & Lintner, a partnership engaged in the general building construction business in Denver, to perform for a price estimated at $2,300, certain electrical work, including the furnishing of materials on a commercial building being erected by Doose & Lintner, on Bannock Street in Denver.[2] Doose & Lintner also entered into arrangements with other contractors to perform essential work on that building. Gould & Preisner began work on the Bannock Street building late in October 1947 (R. 227; 60-61). Its employees were the only non-union employees working on the building. The others, including plumbers, laborers and carpenters, employed by Doose & Lintner and various subcontractors engaged on the job were members of unions affiliated with the Council (R. 230-231; 91, 114-115).

In November 1947, and again about a month later, Jack Fisher, an assistant business agent of the Electricians, met Earl Gould, a partner in

---

[2] As hereinafter noted, Doose & Lintner terminated the services of Gould & Preisner before completion of the work undertaken by the latter; at the time its services were terminated, Gould & Preisner had spent $348.55 for materials used by it on the project. The record does not disclose what percentage, if any, of these materials came from out-of-state sources (R. 218; 175).

Gould & Preisner, and after pointing out to him that his firm's employees were the only non-union men working on the Bannock Street job, said that he did not see how it could progress with them working on that job. Gould insisted that they would complete their work pursuant to their contract unless they were "bodily put off." Fisher replied that the situation would be difficult for both Gould & Preisner and Doose & Lintner (R. 228; 63-64).

On January 8, 1948, a representative of the Electricians reported to the Council's business representative, Clifford Goold,[3] that the services of Gould & Preisner were being used by Doose & Lintner on the Bannock Street job. That same day, the Council's Board of Business Agents held a meeting attended by a majority of the business agents of various craft unions affiliated with the Council, including Clyde Williams and Jack Fisher, agents of the Electricians, and Mike McDonough, an agent of the Plumbers. At this meeting it was decided, and business representative Clifford Goold of the Council was instructed, "to place a picket on the Bannock Street job stating that the job was unfair" to the Council. In keeping with the Council's practice, each organization affiliated with it was furnished with a copy of the minutes of that meeting, which noted the decision to picket Doose & Lintner's Bannock Street job. (R. 228-229; 129-

[3] This individual is to be distinguished from Earl Gould, a partner in Gould & Preisner.

131, 132-133). The Council's action was taken pursuant to its bylaws.[4]

Shortly after this action was taken, Clifford Goold, Fisher, and McDonough visited the Bannock Street job, where they conferred with Lintner, Doose and Earl Gould. Clifford Goold and Fisher reminded Lintner that Gould & Preisner was non-union, and that union men could not work on the job with non-union men. Goold also told Lintner that if Gould & Preisner worked on the job, the Council and its affiliates would have to put a picket on it to notify their members that non-union men were working on the job and that the job was

---

[4] These bylaws provide, in part, as follows (R. 237-238; 185-186):

ARTICLE 1-B

* * * * * *

Section 2. The Board of Business Agents, by majority vote at any regular meeting, shall have the power to declare a job unfair and remove all men from the job. They shall also have the power to place the men back on the job when satisfactory arrangements have been made.

Section 3. Any craft refusing to leave a job which has been declared unfair or returning to the job before being ordered back by the Council or its Board of Agents shall be tried, and if found guilty, shall be fined the sum of $25.00.

* * * * * *

ARTICLE XI-B

* * * * * *

Section 2. The representative of the Council shall have the power to order all strikes when instructed to do so by the Council or Board of Agents. Any member of an affiliated craft who refuses to stop work when ordered to do so by the Council or Board of Agents, shall be reported for action in the Council. All employees on a struck job shall leave the same when ordered to do so by the Council Agent and remain away from the same until such time as a settlement is made, or otherwise ordered.

"unfair." McDonough advised Doose that if he [McDonough] were a contractor "he probably could get rid of Gould & Preisner." Fisher and McDonough informed Gould and Lintner that the Bannock Street job was "too big a job" for the unions to permit non-union electricians to work on it. Gould insisted on completing the job, and McDonough and the Council's representative, Goold, then told Lintner, Doose and Gould that there would be a picket on the job, and that union men, knowing that union bylaws bar union men from working on a picketed job, would leave the job (R. 229-230; 90-91, 112-114, 116-117).

On January 9, the Council's business representative, Clifford Goold, posted a picket on the Bannock Street job carrying a placard reading, "This job unfair to Denver Building and Construction Trades Council." The picket was paid by the Council. The picketing continued from January 9th through January 22, 1948. During this two-week period, no union employees worked on the building; the only employees who reported for work were the non-union electricians of Gould & Preisner (R. 230-231; 29, 65, 92, 93-95, 131-132).[5]

[5] When the picketing began, there were some union laborers and plumbers at work. The union plumbers on observing the picket line, when they reported for work, picked up their tools and left. The laborers also quit work. The union carpenters had been removed just prior to the picketing in anticipation of it and transferred by Doose & Lintner to another project where construction work continued without interruption during the picketing of the Bannock Street project (R. 230; 94-95, 114-115).

On January 22, before Gould & Preisner had completed its work on the project, Lintner telephoned Preisner and told him that he "would have to get off the job, so he [Lintner] could continue with his project." On the same day, Doose & Lintner, after first showing it to Clifford Goold of the Council, mailed a letter to Gould & Preisner, notifying the latter that its services were being terminated on the Bannock Street job because "your employees are unable to perform services while the employees of other subcontractors are working on the premises" (R. 231; 121-122, 93-94, 181).

On the following day, January 23, the Council removed its picket and shortly thereafter the union employees resumed work on the Bannock Street project. Although Gould & Preisner wrote to Doose & Lintner on January 24 protesting the treatment which it was receiving, its electricians were denied entrance to the Bannock Street job, and thereafter performed no work on that project (R. 232; 82, 95, 182).

On the basis of the foregoing facts, the Board found (R. 258) that the Council and its affiliates, the Electricians and Plumbers, by picketing Doose & Lintner's Bannock Street project and thereby causing members of the local unions affiliated with the Council employed by Doose & Lintner and others to stop working on that job, engaged in, and induced and encouraged these employees to engage in, a strike or concerted refusal to perform services in

the course of their employment. The Board further found (*ibid.*) that an object of this strike action was to force or require Doose & Lintner to cease doing business with Gould & Preisner. The Board, accordingly, concluded that the Council, the Electricians and the Plumbers had engaged in strike action prohibited by Section 8 (b) (4) (A) of the Act.

The Board ordered (R. 260-261) the Council and its two affiliates to cease and desist from engaging in, or inducing or encouraging the employees of Doose & Lintner or any other employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require Doose & Lintner or any other employer or other person to cease doing business with Gould & Preisner.

The court below on September 1, 1950, handed down its opinion and judgment denying enforcement of the Board's order. The court held, in accordance with the Board's view[6] (see Petition of the National Labor Relations Board for a Writ of Certiorari in *National Labor Relations Board* v. *International Rice Milling Company*, No. 313, this

---

[6] *Oil Workers International Union, Local 346 and The Pure Oil Company*, 84 NLRB 315; *United Electrical, Radio and Machine Workers of America and Ryan Construction Corporation*, 85 NLRB 417.

Term, pp. 8-10, that the provisions of Section 8 (b) (4) (A) of the Act, insofar as here pertinent, are directed against secondary boycotts but are not directed against primary strike action. The court, however, gave broader scope to the concept of primary strike action than did the Board. The court stated that the "usual secondary boycott or strike is against one who is not a party to the original dispute. It is designed to cause a neutral to cease doing business with, or to bring pressure upon, the one with whom labor has a dispute. It seeks to enlist this outside influence to force an employer to make peace with the employees or labor organization contesting with him." The court concluded that the strike engaged in here was primary and not secondary in this "usual" sense, and that it was therefore outside the ban of Section 8 (b) (4) (A). In support of this conclusion, the court stated as follows (R. 277, 279):

> The picketing and resulting strike were at the premises of the contractor where the subcontractor's men were at work. It grew out of a controversy over the conduct of the contractor in participating in the bringing of the non-union men onto the job as well as over the conduct of the electrical subcontractor in employing them. The purpose of the Council was to render the particular job all union. It was not to require Gould & Preisner to unionize their shop located elsewhere or to bring pressure against Doose & Lintner at any other place because of the employment of Gould & Preisner

at Bannock Street. Accordingly the object was not in any literal sense to require Doose & Lintner to cease doing business with Gould & Preisner. The pressure was limited to the one job, which was picketed as a whole to make it wholly union and in protest against the employment there of the non-union electricians.

* * * * *

Doose & Lintner was not neutral. It brought Gould & Preisner with the non-union labor onto the job. This brought the Council and Doose & Lintner into direct controversy. The picketing was designed to change the situation by bringing about the employment only of union labor on the Bannock Street job. There was no geographical separation at that location between Doose & Lintner and Gould & Preisner. Only by ceasing to work for Doose & Lintner could petitioners' members avoid working with Gould & Preisner's non-union men. Petitioners did not say to Doose & Lintner, in effect, "We will not work for you if you do business with Gould & Preisner." They said, in effect, "we will not work with non-union men, and therefore we will not work for you at the place to which you bring Gould & Preisner with non-union men." We think this action of petitioners was of a primary character even if petitioners envisaged it might result in a cessation of work on the particular job by Gould & Preisner.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the strike was primary and not

secondary action within the meaning of Section 8 (b) (4) (A), and therefore outside the scope of that section.

2. In holding that a primary dispute between the Council and its affiliates and Doose & Lintner existed by reason of the latter's action in bringing Gould & Preisner's non-union labor on the Bannock Street project.

3. In apparently rejecting the Board's finding that an object of the strike was to force Doose & Lintner to cease doing business with Gould & Preisner.

4. In seemingly holding that the relationship between a contractor and a subcontractor on a construction project is not comprehended by the phrase "doing business," as used in Section 8 (b) (4) (A).

5. In failing to enforce the Board's order.

REASONS FOR GRANTING THE WRIT

1. The holding of the court below on the question presented is, as the opinion itself suggests, in conflict with the decision of the Court of Appeals for the Second Circuit in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, and of the Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *Local 74, United Brotherhood of Carpenters, etc.*, 181 F. 2d 126. The decision is also in conflict with the decision of the Fifth Circuit in *In-*

ternational Rice Milling Co. v. *National Labor Relations Board*, 183 F. 2d 21, with respect to the existence of a difference between "primary" and "secondary" disputes in the application of Section 8 (b) (4) of the Act. On this point the Board, believing the decision in the instant case to be correct, has filed a petition for certiorari (No. 313, this Term) in the *Rice Milling* case.

In the *Electrical Workers* case, the Second Circuit, one judge dissenting, held that by picketing a construction project for the purpose of forcing the general contractor to cease doing business with a non-union subcontractor on the project the Union violated Section 8 (b) (4) (A). In so holding, the Second Circuit stated that it made no difference that the general contractor was responsible for bringing the subcontractor on the job; his action in this respect did not give rise to a "primary" dispute between him and the Union so as to exempt picketing of the entire building job from the reach of Section 8 (b) (4) (A). The court said (181 F. 2d at p. 37):

> The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands. We cannot see why it should make any difference that the third person is engaged in a com-

> mon venture with the employer, or whether he is dealing with him independently. The phrase "doing business," would ordinarily cover doing any business which the third party is free to discontinue, regardless of whether he is merely supplying materials to the employer, or has subcontracted with him to perform part of a work which the third party has himself contracted to do. The third party cooperates as truly with one to whom he furnishes materials as with a subcontractor. Indeed, when the coercion is upon the third person to break a contract with the employer, his position is more embarrassing than if he may discontinue his relations with the employer without danger of liability. The phrase, "cease doing business," is general and admits of no such evasion.

The court below, on the other hand, held that because the Council's pressure was limited to the one construction project, where Gould and Preisner were using non-union men, "the object was not in any literal sense to require Doose & Lintner to cease doing business with Gould & Preisner."

In the *Electrical Workers* case, the Second Circuit observed that a distinction might be drawn where the operations of the employer with whom the Union is engaged in a dispute "may be so enmeshed with that of the third party that it is impossible to picket one without picketing the other" and that such might have been the situation if, in the case before it, the subcontractor's employees had been at work on the job when the picket-

ing occurred and the Union's only purpose in picketing had been to induce them to quit.[7] Although, in the instant case, Gould & Preisner's employees were at work on the building project during the picketing, whereas in the *Electrical Workers* case the employees of the subcontractor were not, this difference affords no basis for distinction. The court below did not find in the instant case that the Unions' only purpose in picketing was to induce the employees of Gould & Preisner to quit. In both cases, the picketing was directed against the general contractor and the entire construction job. The court below held that the picketing was primary and therefore beyond the proscription of Section 8 (b) (4) (A) because, in its view, the action of the general contractor in bringing the non-union subcontractor on the job made him a primary disputant. In the view of the Second Circuit, on the other hand, the action of the general contractor in bringing a non-union subcontractor on the job does not create a primary dispute authorizing the Union to picket the general contractor.

In the *Local 74* case, the Sixth Circuit held that a union's action, in ordering a strike of its members employed on a building project because the general contractor had brought the employees of a non-union subcontractor on the job was an unfair labor practice within the meaning of Section 8 (b) (4)

---

[7] The Second Circuit left open the question whether Section 8 (b) (4) (A) prohibits picketing under such circumstances.

(A) of the amended Act. This holding is likewise in conflict with the decision of the court below, for it necessarily rejects the premise, upon which the decision below rests, that the action of a general contractor in engaging a non-union subcontractor on the job creates a primary dispute between the general contractor and the union, thereby authorizing the union to engage in a strike at the project to force the general contractor to cease doing business with the subcontractor.[8]

2. The question presented is an important one in the administration of the amended Act. A spot check of the records of the Board discloses that since the effective date of the amended Act, August 22, 1947, approximately 25 percent of nearly 200 charges filed under the statute alleging violations of Section 8 (b) (4) (A) of the Act which have been submitted to the General Counsel of the Board for consideration and appropriate action have involved strikes, picketing, or threats thereof against construction jobs because of the employment thereon of non-union subcontractors. The same problem also arises in connection with Section 8 (b) (4) (B) of the Act.

A large part of the construction work in the Nation is done by means of arrangements between

[8] Because of the conflict between the decision of the court below and those of the Second and Sixth Circuits, the Government is withdrawing, in part, its opposition to the petitions for certiorari in No. 108 and No. 85, this Term, so as to consent to the petitions insofar as they present the question common to all three cases.

contractors and subcontractors similar to those in the instant case.[9] The question presented is therefore a recurring one of widespread importance to employers and labor organizations in the construction industry, and to the public generally.

CONCLUSION

The decision below is in conflict with the decisions of two other Circuit Courts of Appeals. The question raised by these decisions is of importance in the administration of the amended Act. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

OCTOBER, 1950.

[9] Indicative of the far-reaching scope of the problem is the fact that in March 1948, the latest date for which figures are available, out of approximately 2,000,000 workers employed in the contract construction industry, in excess of 900,000 were employed by so-called special trade contractors such as electricians, plumbers, etc. Social Security Administration, Bureau of Old-Age and Survivor's Insurance "Estimated March 1948 Employment By Industry and Size of Reporting Unit." (Table 22)

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*) are as follows:

* * * * *

UNFAIR LABOR PRACTICES

Sec. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; * * *

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 905825 185